

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DUWAYNE HILLIARD,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 242157

Kent Circuit Court

LC No. 01-008440-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of assault with intent to commit great bodily harm less than murder, MCL 750.84. The jury found defendant not guilty of kidnapping, MCL 750.349, and first-degree home invasion, MCL 750.110a(2), and found defendant guilty of assault with intent to commit great bodily harm as a lesser included offense of the original charge, assault with intent to commit murder, MCL 750.83.

Defendant's conviction stems from incidents which occurred in the early morning hours of July 23, 2001. Defendant broke into his ex-girlfriend's apartment, woke her up, dragged her out of the apartment, and once in the backyard proceeded to beat the victim in the head. After the beating in her backyard, defendant drove the victim around for some time in his vehicle, but later agreed to take her to the hospital.

During this change of heart, defendant called a mutual friend of his and the victim's from a pay phone in front of a gas station, and left an answering machine message asking the mutual friend to take care of the victim's children. Defendant then drove to his home. When defendant went inside, complainant took the opportunity to flee to a neighbor's house.

Following trial, but before the jury had returned with its verdict, the parties found out that during deliberations the jurors might have been using a map not introduced at trial. It was later confirmed that the jury used the map during deliberations. Defendant first brought a motion for mistrial, and later a motion for a new trial, arguing that the map was extrinsic evidence not introduced at trial, and that the jury's use of the map violated defendant's Sixth Amendment rights. US Const, AM VI. The trial court found that the map could only reasonably have been a factor in the kidnapping charge against defendant. Because defendant was acquitted of that charge, the trial court reasoned that the error caused by the extrinsic evidence in the jury deliberations was harmless.

On appeal, defendant argues that the map bolstered the complainant's credibility, and that it is not possible to know the extent to which the map caused defendant prejudice. Defendant contends that use of the map unfairly influenced the jury's adverse verdict that defendant was guilty of assault with intent to do great bodily harm. We disagree.

There is no per se rule of reversal when extrinsic influences are introduced to jury deliberations. See *People v Messenger*, 221 Mich App 171; 561 NW2d 463 (1997); *People v Gayton*, 81 Mich App 390; 265 NW2d 344 (1978). However, where an extrinsic influence calls into question the integrity of the judicial process a new trial is warranted. *People v Clark*, 220 Mich App 240; 559 NW2d 78 (1996). In *Clark*, this Court held that, where the jury found a white powdery substance resembling cocaine in the defendant's gun case, one of the People's exhibits, the presence of the cocaine was so offensive to the maintenance of a sound judicial system that it could never be harmless, and a mistrial was required. *Id.*, at 244-246. Here, there is no evidence whatsoever that the prosecution introduced the illicit map into the jury's deliberations, so this case is distinguishable on its facts from *Clark*. *Id.*

Because there is no per se rule of reversal, and the facts of this case are not intrinsically offensive to maintenance of the judicial system, we evaluate this claim by the standard set forth by our Supreme Court in *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997):

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. [Internal citations omitted.]

There is no question that the map used by the jurors during their deliberations was an extrinsic influence. Thus, defendant has proved the first point under the *Budzyn* analysis. However, defendant fails to prove how the map was in any way material to the jury's determination that defendant committed assault with intent to commit great bodily harm in his ex-girlfriend's backyard. We agree with the trial court's finding that the map could only have related the charge of kidnapping, of which the jury found defendant not guilty. Defendant fails to show that the map could in any way have influenced a material aspect of the crime for which he was convicted.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray